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ATLANTIC RECORDING CORPORATION;
SONY BMG MUSIC ENTERTAINMENT;
WARNER BROS. RECORDS INC.; ARISTA
RECORDS LLC; BMG MUSIC; MAVERICK
RECORDING COMPANY; UMG
RECORDINGS, INC.; and CAPITOL
RECORDS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ATLANTIC RECORDING CORPORATION, a
Delaware corporation; SONY BMG MUSIC
ENTERTAINMENT, a Delaware general
partnership; WARNER BROS. RECORDS INC.,
a Delaware corporation; ARISTA RECORDS
LLC, a Delaware limited liability company; BMG
MUSIC, a New York general partnership;
MAVERICK RECORDING COMPANY, a
California joint venture; UMG RECORDINGS,
INC., a Delaware corporation; and CAPITOL
RECORDS, INC., a Delaware corporation,

Plaintiffs,

vs.

CHARLES SERRANO,

Defendant.

Case No.: 07CV1824 W JMA

Honorable Thomas J. Whelan

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO DISMISS
DEFENDANT'S COUNTERCLAIMS
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(b)(6)**

Date: December 10, 2007

Time: N/A

Location: Courtroom 7

**[NO ORAL ARGUMENT PER LOCAL
RULE]**

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1 Plaintiffs respectfully submit this Motion to Dismiss Defendant's Counterclaims under Fed.
2 R. Civ. P. 12(b)(6). As ground therefore, Plaintiffs state as follows:

3 I. INTRODUCTION

4 Plaintiffs bring this action seeking redress for the infringement of their copyrighted sound
5 recordings pursuant to the Copyright Act, 17 U.S.C. §101, *et seq.* Since the early 1990s, Plaintiffs
6 and other copyright holders have faced a massive and exponentially expanding problem of digital
7 piracy over the Internet. Today, copyright infringers use various peer-to-peer ("P2P") networks to
8 reproduce or copy (download) or distribute (upload) to others billions of perfect digital copies of
9 Plaintiffs' copyrighted sound recordings. As a result of the rise of P2P networks, Plaintiffs have
10 sustained and continue to sustain devastating financial losses.

11 On February 8, 2007, Plaintiffs' investigators detected an individual using the LimeWire file
12 sharing service on the Gnutella P2P network to engage in copyright infringement. (Complaint, ¶
13 18). Plaintiffs' investigators detected the infringement by logging onto the P2P network in the same
14 fashion as any Internet user and viewing the files that this individual was distributing to other users.
15 This individual had as many as 224 digital audio files on his computer and was distributing them for
16 free both to Plaintiffs' investigators and to millions of others using similar P2P networks.
17 (Complaint, ¶ 18). Plaintiffs' investigators further ascertained that this individual used Internet
18 Protocol "IP" address 69.237.185.46 to connect to the Internet.

19 After filing a "Doe" lawsuit against the individual using that IP address, Plaintiffs
20 subpoenaed this individual's internet service provider to determine his or her identity.¹ The internet
21 service provider, SBC Internet Services, Inc. ("SBC"), identified Defendant Charles Serrano as the
22 individual in question. Plaintiffs subsequently filed their Complaint against Defendant for copyright
23 infringement.

24
25 ¹ Plaintiffs filed the "Doe" suit in this district. *Sony BMG Music Ent v. Does 1-16*, Case No.
26 07-cv-00581 BJM (S.D. Cal. 2007). Prior to issuing the subpoena, Plaintiffs filed an *ex parte*
27 application for leave to take immediate discovery. Pursuant to Judge Moskowitz' order granting
28 Plaintiffs' application for leave to take immediate discovery, Plaintiffs served a Rule 45 subpoena on
the internet service provider that issued the IP address in order to learn the identity of the individual
to whom it had been issued.

On September 19, 2007, Defendant filed his Counterclaim and Demand for Jury Trial (“Counterclaims”). In his Counterclaims, Defendant accuses Plaintiffs of a laundry list of misbehaviors and asserts five separate counts, including: (1) Declaratory Judgment of Non-Infringement; (2) Trespass; (3) Violation of Computer Fraud and Abuse Act 18 U.S.C. §1030; (4) Invasion of Privacy; and (5) Intentional Infliction of Emotional Distress (“IIED”).

Defendant’s declaratory judgment counterclaim is a mirror image of Plaintiffs’ copyright infringement claim. This counterclaim is, therefore, duplicative and should be dismissed or stricken under Rule 12 as redundant and unnecessary. Each of Defendant’s remaining counterclaims is subject to dismissal under Rule 12(b)(6) because each one of them fails to allege one or more elements necessary to state a claim upon which relief can be granted.

Moreover, not only does Defendant fail to allege facts to support the essential elements of each of his counterclaims, but the underlying basis of all of Defendant’s claims (although not clearly stated) is that Plaintiffs should somehow be held liable for their legitimate efforts to enforce their copyrights. That, of course, is not only improper, but is contrary to the public policy desire to have copyright owners enforcing their rights. See *Kebodeaux v. Schwegmann Giant Super Markets, Inc.*, 33 U.S.P.Q.2d 1223, 1224 (E.D. La. 1994) (holding that it would be inconsistent with the purposes of the Copyright Act to “deter plaintiffs . . . from bringing suits when they have a reason to believe, in good faith, that their copyrights have been infringed”); *Mestre v. Vivendi Universal US Holding Co.*, 2005 US Dist. LEXIS 41023, *8 (D. Or. 2005) (observing same). Indeed, Defendant accuses Plaintiffs of filing a frivolous suit, and alleges that their conduct in filing suit is despicable, extortionate and oppressive. (Counterclaim, ¶¶ 39, 40). In a recent case in Texas involving a similar effort by record company plaintiffs to enforce their rights against another P2P infringer, the Court considered a similar attack on Plaintiffs’ motives and concluded:

The Court rejects [defendant]’s characterization of this lawsuit, and many others like it, as “predatory.” Plaintiffs’ attorneys brought this lawsuit not for purposes of harassment or to extort [defendant] as he contends, but rather, to protect their clients’ copyrights from infringement and to help their clients deter future infringement For now, our government has chosen to leave the enforcement of copyrights, for the most part, in the hands of the copyright holder. See 17 U.S.C. §101, *et seq.* Plaintiffs face a formidable task in trying to police the internet in an effort to reduce or put a stop to the online piracy of their copyrights. Taking aggressive action, as Plaintiffs have, to defend their copyrights is certainly not sanctionable conduct under Rule 11.

1 The right to come to court to protect one's property rights has been recognized in this
2 country since its birth.

3 *Atlantic Recording Corp. v. Heslep*, Civil Action No. 06-cv-0132-Y, slip op. at 11-12 (N.D. Texas
4 May 16, 2007) (Exhibit A).

5 As set forth below, each of Defendant's counterclaims is subject to dismissal. All of the
6 claims should be dismissed because they fail to state a claim upon which relief can be granted.
7 Further, the conduct upon which counts 4 and 5 are based is protected by the California litigation
8 privilege and/or the *Noerr-Pennington* doctrine, which afford litigants and witnesses the utmost
9 freedom of access to the courts without fear of being harassed subsequently by derivative tort
10 actions. See *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d
11 1525, 1528 (9th Cir. 1991); *California Physicians' Service v. Superior Court*, 9 Cal. App. 4th 1321
12 (1992).

13 In short, the legitimate conduct of which Defendant complains is not actionable, and his
14 counterclaims should be dismissed in their entirety.

15 **II. STANDARD OF REVIEW.**

16 In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept as
17 true all material allegations, as well as all reasonable inferences to be drawn from them. *Pareto v.*
18 *F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). However, "conclusory allegations without more are
19 insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell Chem. Co.*,
20 845 F.2d 802, 810 (9th Cir. 1988). The allegations found in the Complaint "must be enough to raise
21 a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965
22 (2007). In addition, courts routinely dismiss complaints for failure to state a claim upon which relief
23 can be granted where, as here, an affirmative defense (e.g., litigation privilege) appears on the face
24 of the pleading. See, e.g., *Northwest Airlines, Inc. v. Camacho*, 296 F.3d 787, 791 (9th Cir. 2002).

25 **III. DEFENDANT'S DECLARATORY JUDGMENT COUNTERCLAIM (COUNT 1) 26 SHOULD BE DISMISSED BECAUSE IT IS REDUNDANT.**

27 Defendant's first counterclaim seeks a declaratory judgment that Defendant did not infringe
28 Plaintiffs' copyrights. (Counterclaim, Count 1 at p.6). This counterclaim is redundant of Plaintiffs'
claim for copyright infringement. A decision on the merits of Plaintiffs' copyright claim will render

1 Defendant's request for declaratory judgment moot. This Court should, therefore, dismiss
2 Defendant's claim for declaratory relief because it is duplicative and unnecessary.

3 Courts routinely dismiss "mirror image" counterclaims where they merely restate issues
4 already before the court as part of plaintiff's affirmative case. See, e.g., *Avery Dennison Corp. v.*
5 *Acco Brands, Inc.* 2000 U.S. Dist. LEXIS 3938, *12-14 (C.D. Cal. 2000) (dismissing counterclaim
6 for declaratory judgment of non-infringement and no dilution because it was redundant to plaintiff's
7 complaint for trademark infringement and dilution); *Pettrey v. Enter. Title Agency, Inc.*, 2006 U.S.
8 Dist. LEXIS 83957, *9 (6th Cir. 2006) ("courts should dismiss or strike a redundant counterclaim
9 when it is clear that there is a complete identity of factual and legal issues between the complaint and
10 the counterclaim") (internal quotations omitted); *Aldens, Inc. v. Packel*, 524 F.2d 38, 53 (3d Cir.
11 1975) (dismissing Attorney General's counterclaim for declaratory relief where counterclaim
12 presented the "identical issues posited by the complaint"); *GNB Inc. v. Gould, Inc.*, 1990 U.S. Dist.
13 LEXIS 16172, *12 (N.D. Ill. 1990) (dismissing counterclaim as "duplicative" where it was
14 "essentially a restatement" of plaintiff's claim from defendant's perspective); *Veltman v. Norton*
15 *Simon, Inc.*, 425 F. Supp. 774, 776 (S.D.N.Y. 1977) (dismissing counterclaim for declaratory relief
16 as "redundant" and "moot").

17 Courts across the country have dismissed virtually identical declaratory judgment
18 counterclaims filed against many of the same record company plaintiffs in similar copyright
19 infringement cases. See *Sony BMG Music Entmt. v. Crain*, Case No. 06-cv-00567 TH (E.D. Tex.
20 Sept. 26, 2007) ("Defendant's counterclaim seeking a declaration of non-infringement raises no legal
21 or factual issues outside of those raised by plaintiffs' complaint, and is simply plaintiffs' copyright
22 claim recast from the perspective of defendant") (Ex. B); *Maverick Recording Co. v. Harper*, Case
23 No. 07-cv-00026 XR (W.D. Tex. Sept. 27, 2007) (Dismissing defendant's declaratory judgment
24 counterclaim because it was the "mirror image" of Plaintiffs' copyright claim) (Ex. C); *Interscope*
25 *Records v. Kimmel*, Case No. 07-cv-0108 (N.D.N.Y. June 18, 2007) ("By asserting non-infringement
26 as a counterclaim, Defendant is simply attempting to recast himself as the Plaintiff") (Ex. D);
27 *Atlantic Recording Corp. v. Demassi*, Case No. 07-cv-0006 (S.D. Tex. May 21, 2007) (Dismissing
28 declaratory judgment counterclaim as "redundant and unnecessary") (Ex. E); *Interscope Records v.*

1 *Duty*, Case No. 05-cv-03744 PHX (D. Ariz., Apr. 14, 2006) (Dismissing declaratory judgment
2 counterclaim) (Ex. F);

3 Here, Defendant seeks a declaration that he has not infringed Plaintiffs' copyrights. That
4 precise issue of infringement is set forth in Plaintiffs' Complaint. Defendant's declaratory judgment
5 counterclaim raises no legal or factual issues outside those raised by Plaintiffs' Complaint, and is
6 simply Plaintiffs' copyright claim recast from the perspective of Defendant.

7 For these reasons, Defendant's counterclaim for declaratory relief is entirely redundant of
8 Plaintiffs' claim. Accordingly, it should be dismissed.

9 **IV. DEFENDANT'S CLAIM FOR TRESPASS (COUNT 2) SHOULD BE DISMISSED**
10 **BECAUSE HE HAS NOT ADEQUATELY PLED THE ESSENTIAL ELEMENTS OF**
11 **THE CLAIM.**

12 The tort of trespass to chattels allows recovery for interferences with possession of personal
13 property not sufficiently important to be classified as conversion. *Intel Corp. v. Hamidi*, 30 Cal. 4th
14 1342, 1350 (2003). Under California law, a trespass to chattels lies where an intentional interference
15 with the possession of personal property has proximately caused injury. *Id.* at 1351-1352. "In cases
16 of interference with possession of personal property not amounting to conversion, the owner has a
17 cause of action for trespass, *and may recover only the actual damages suffered by reason of the*
18 *impairment of the property or the loss of its use.*" *Id.* (emphasis in original). California law follows
19 the general rule that a trespass to chattels is not actionable if it does not involve actual or threatened
20 injury to the personal property or to the possessor's legally protected interest in the personal
21 property. *Id.* at 1364.

22 In *Intel Corp.*, the California Supreme Court considered the issue of whether unwelcome
23 e-mails, sent by one of Intel's former employees to Intel's current employees, constituted a trespass
24 to chattels. *Id.* The plaintiff, Intel, maintained an e-mail system, connected to the Internet, through
25 which messages between the employees and those outside the company could be sent and received.
26 Intel sued its former employee claiming that by communicating with its employees over its e-mail
27 system he committed the tort of trespass to chattels.

28 The California Supreme Court rejected this claim and held that there was no trespass to
chattel because Intel did not demonstrate any injury to its personal property, or to its legal interest in

1 that property. *Id.* at 1359-1360. In reaching this holding, the Court recognized that the decisions
2 finding electronic contact to be a trespass to computer systems have generally involved some actual
3 or threatened interference with the computers' functioning. *Id.* at 1353 (citing numerous federal
4 district court decisions).

5 The Court further observed that Intel connected its e-mail system to the Internet and
6 permitted its employees to make use of this connection both for business and personal purposes, and
7 in doing so, Intel necessarily contemplated the employees' receipt of unsolicited, as well as solicited,
8 communications from outside the company. *Id.* at 1359. The Court recognized that it was inevitable
9 that some communications would be unwelcome, but that Defendant did nothing but use the e-mail
10 system for its intended purpose – to communicate with employees – and that without any physical or
11 functional harm or disruption, the occasional unwelcome transmission could not reasonably be
12 viewed as impairing the quality or value of Intel's computer system. *Id.*

13 Here, Defendant has made no allegation that Plaintiffs' actions have caused some actual or
14 threatened interference with his possession or legally protected interest in his computer. He does not
15 – and cannot – claim that the actions of which he complains have deprived him of the right to
16 possess his computer files or his use thereof, and there is no suggestion that Defendant's computer
17 files have been impaired, altered, or otherwise damaged. Nor does Defendant claim that Plaintiffs
18 (or their investigator) deprived him of the right to possess or use his computer files when it detected
19 the infringement at issue by using the same LimeWire software functionalities used by other
20 individuals who engage in file swapping. Indeed, Defendant does not – and cannot – allege that
21 Plaintiffs disturbed his possession of any personal property at all.

22 Instead, Defendant simply alleges that he has suffered damages, including "embarrassment,
23 anxiety, mental distress, emotional pain and suffering, inconvenience, and financial distress."
24 (Counterclaim, at ¶ 47). These allegations are insufficient to suggest that Defendant's possession of
25 his computer files was ever disturbed, damaged or threatened, and insufficient to state a claim for
26 trespass. *See Intel Corp.*, 30 Cal. 4th at 1364; *see also Arista Records, L.L.C. v. Tschirhart*, 2006
27 U.S. Dist. LEXIS 70332, *7 (W.D. Tex. Aug. 23, 2006) (holding that defendant could not maintain
28

1 cause of action for electronic trespass where there was no allegation that plaintiffs damaged the
2 computer or denied defendant access to it) (Ex.G).

3 Additionally, Defendant alleges that Plaintiffs' investigators conducted an electronic or
4 physical search of Defendant's computer without Defendant's knowledge, permission and consent.
5 (Counterclaim, at ¶ 44). However, by using the LimeWire P2P file sharing software to swap files
6 over the Internet, a user gives other LimeWire users on the Internet the ability to view and download
7 any files in the "shared folder" that the user distributes over the P2P networks. *See Columbia*
8 *Pictures*, 2007 U.S. Dist. LEXIS 63620, *7 (observing that users of P2P file sharing systems have
9 little to no expectation of privacy because they broadcast their identifying information to everyone in
10 the "swarm" as they download the file); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4
11 (D. Kan. 2000) (explaining that one is able to view another's computer files when the file share
12 mechanism is turned on, thereby allowing other users to view those files); *Elektra Entm't Group,*
13 *Inc v. Does 1-9*, 2004 U.S. Dist. LEXIS 23560, at *13 (S.D.N.Y. Sep. 8, 2004) (holding Defendant
14 has "minimal 'expectation of privacy in downloading and distributing copyrighted songs without
15 permission").

16 Thus, there can be no claim of trespass because the only reason Plaintiffs were able to detect
17 Defendant's infringement was because his "shared" folder was open for others to view.
18 Notwithstanding this fact, even if Defendant could establish that Plaintiffs viewed his shared folder
19 without his permission or consent, his claim still fails because he has not alleged any actual or
20 threatened damage to his legal interests in his computer or his computer files. Without any physical
21 or functional harm or disruption, the occasional "unwelcome" electronic transmission can not
22 reasonably be viewed as impairing Defendant's interest in his computer. *See Intel Corp*, 30 Cal. 4th
23 at 1359.

24 For all of these reasons, Defendant's second counterclaim for trespass should be dismissed.

25 **V. DEFENDANT'S CLAIM THAT PLAINTIFFS VIOLATED THE COMPUTER**
26 **FRAUD AND ABUSE ACT (COUNT 3) SHOULD BE DISMISSED BECAUSE**
27 **DEFENDANT HAS NOT PROPERLY PLED THE ELEMENTS OF A CIVIL CLAIM**
28 **UNDER THAT ACT.**

 Defendant's third claim alleges violations of the Computer Fraud and Abuse Act ("CFAA").
The CFAA "is primarily a criminal statute, but it also creates a private cause of action in Section

1 1030(g).” *In re America Online, Inc. Version 5.0 Software Litigation*, 168 F. Supp. 2d 1359, 1368
2 (S.D. Fla. 2001). Section 1030(g) authorizes a civil cause of action only in limited circumstances.
3 18 U.S.C. §1030(g).

4 The CFAA prohibits a number of very specific computer activities, from hacking into
5 government computers with classified information to accessing credit report information or the
6 computers of financial institutions. Defendant does not specify which provision he contends
7 Plaintiffs have violated. Nonetheless, all of the activities prohibited by the CFAA require the access
8 of, or intentional damage to, another’s computer *without authorization*. See, e.g., *In re America*
9 *Online*, 168 F. Supp. 2d at 1369-72 (differentiating between 18 U.S.C. §§ 1030 (a)(5)(B) and (C)
10 which prohibit access of a computer by an outsider from 18 U.S.C. § 1030 (a)(5)(A) which prohibits
11 intentional damage to a computer by an outsider or insider); *Theofel v. Farey-Jones*, 359 F.3d 1066,
12 1078 (9th Cir. 2004). Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their
13 investigators acted without authorization.

14 As previously discussed, Plaintiffs’ investigators detected Defendant’s shared folder because
15 the LimeWire P2P software utilized by Defendant to swap files over the Internet has a file-sharing
16 feature that was enabled at the time the infringement was detected. This feature gives anyone else
17 on the Internet the ability to view and download any files in the “shared folder” that the user
18 distributes over the P2P networks. See *Kennedy*, 81 F. Supp. 2d at 1106 n.4 (explaining detection
19 through file-sharing program). Defendant’s action in enabling the file sharing feature authorized the
20 whole world to view and download his digital audio files – making them as publicly accessible as
21 any web site on the Internet. By making the “shared folder” available to the public, Defendant
22 granted exactly the type of authorization contemplated by the CFAA. See, e.g., *Tschirhart*, U.S.
23 Dist. LEXIS 70332, at 9 (rejecting similar CFAA claim) (Ex. G); *International Ass’n of Machinists*
24 *& Aerospace Workers v. Werner*, 390 F. Supp. 2d 479 (D. Md. 2005) (dismissing claim under CFAA
25 where defendant had authorization to access computer at issue); see also *In re Verizon Internet*
26 *Servs., Inc.*, 257 F. Supp. 2d at 267; *Elektra Entm’t Group, Inc.*, 2004 U.S. Dist. LEXIS 23560, at
27 *13 (holding Defendant has “minimal ‘expectation of privacy in downloading and distributing
28 copyrighted songs without permission”).

1 In short, Defendant's own actions effectively provided a blanket authorization for others to
2 access the contents of his shared folder. As a result, no claim under CFAA §1030(a)(5)(B) or (C) for
3 *unauthorized* access to Defendant's computer is available to him and the counterclaim, if allegedly
4 arising under those sections, must fail.

5 Furthermore, Defendant's factually deplete and conclusory allegations lack the requisite level
6 of specificity necessary to put Plaintiffs on notice of Defendant's claims. *Pareto*, 139 F.3d at 699
7 ("conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to
8 state a claim"). Defendant alleges that Plaintiffs employed MediaSentry to "break into his personal
9 computer to spy and steal and remove private information," and that it "gained access secretly and
10 illegally." (Counterclaim, ¶ 53). Defendant further alleges that Plaintiffs used Defendant's
11 computer "to appropriate Defendant's personal information for their own purposes." (Counterclaim,
12 ¶ 54).

13 However, Defendant fails to allege any facts in support of these general and conclusory
14 allegations. Specifically, Defendant fails to allege: 1) when or how Plaintiffs allegedly broke into
15 his computer; 2) when or how Plaintiffs allegedly spied on his private information; 3) what private
16 information was spied upon; 4) when or how Plaintiffs removed private information; 5) what private
17 information was removed; 6) what files were inspected, copied or removed; 7) when or how any
18 files were inspected, copied or removed; 8) how Plaintiffs "appropriated" defendant's "personal
19 property," *etc.* (Counterclaim, ¶¶ 53 and 54). Such basic facts are necessary to put Plaintiffs on
20 notice of the nature and basis of Defendant's claims.

21 Although Defendant's Counterclaim does not make any specific factual allegations,
22 Defendant's allegations are presumably based upon the facts alleged in Plaintiffs' Complaint,
23 namely, that, on February 8, 2007, Plaintiffs' investigators detected an individual using the
24 LimeWire file sharing service on the Gnutella P2P network to engage in copyright infringement. No
25 matter how Defendant wishes to characterize this conduct, the simple fact is that it is not actionable
26 under the CFAA because, as discussed above, Defendant broadcast the contents of his "shared"
27 folder by connecting it to a P2P network. *See Tschirhart*, U.S. Dist. LEXIS 70332, at 6 (Ex. G);
28 *see, e.g., Columbia Pictures, Inc. v. Bunnell*, 2007 U.S. Dist. LEXIS 63620, *7 (C.D. Cal. 2007)

(observing that users of P2P file sharing systems have little to no expectation of privacy because they broadcast their identifying information to everyone in the "swarm" as they download the file, and because they openly disclose their IP addresses as part of the file transfer process); *In re Verizon Internet Servs.*, 257 F. Supp. 2d at 267 ("[I]t is hard to understand just what privacy expectation [a peer-to-peer user] has after essentially opening the computer to the world.").

Lastly, as previously discussed, Defendant has not and cannot allege that Plaintiffs damaged his computer in any way, let alone that Plaintiffs intentionally damaged his computer. Under the CFAA, damage is defined as "any impairment to the integrity or availability of data, a program, a system, or information, that . . . causes loss aggregating at least \$5,000 in value during any one year period to one or more individuals." 18 U.S.C. § 1030(e)(8)(A); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001). There is not a single factual allegation in Defendant's counterclaim to support this element other than Defendant's conclusory and legally insufficient statements that Plaintiffs harmed his "property," and that Plaintiffs "interfer[ed] with the integrity and capacity of Defendant's personal computer." (Counterclaim, ¶ 55). Such conclusory allegations are insufficient to state a claim. *See Pareto*, 139 F.3d at 699.

For all the reasons stated above, Defendant's claim should be dismissed.

VI. DEFENDANT'S INVASION OF PRIVACY CLAIM (COUNT 4) SHOULD BE DISMISSED BECAUSE DEFENDANT HAS NOT ADEQUATELY PLED THE ESSENTIAL ELEMENTS OF SUCH A CLAIM, AND BECAUSE THE ACTIONS OF WHICH DEFENDANT COMPLAINS ARE PRIVILEGED.

Defendant's Counterclaim fails to allege any recognized theory of invasion of privacy. California recognizes several forms of invasion of privacy, including: (1) intrusion into private affairs; (2) public disclosure of private facts; (3) false light; and (4) appropriation of name and likeness. *See Shulman v. Group W Prods.*, 18 Cal. 4th 200, 232 (1998); *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 86 (1955). The claimant in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, *i.e.*, he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. *Hill v. Nat'l Collegiate Ath. Ass'n*, 7 Cal. 4th 1, 26 (1994). If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability. *Id*; *see also Aisenon v. American Broadcasting Co.*

220 Cal. App. 3d 146, 162 (1990) (“One factor relevant to whether an intrusion is ‘highly offensive to a reasonable person’ is the extent to which the person whose privacy is at issue voluntarily entered into the public sphere.”); *Melvin v. Reid*, 112 Cal. App. 285, 290 (1931) (“There can be no privacy in that which is already public.”).

Defendant fails to articulate the invasion of privacy theory upon which he is relying to support his claim. Rather, Defendant merely alleges that Plaintiffs “obtained Defendant’s private information relating to his account with his [ISP] through the use of unlawful and improper *ex parte* communications with this Court and by misleading this Court.” (Counterclaim, ¶ 57). For the reasons discussed below, this allegation does not state a claim for invasion of privacy. Because there are absolutely no allegations to the effect that Plaintiffs misappropriated Defendant’s name or likeness, Plaintiffs address only the theories of intrusion upon seclusion, false light, and publication of private facts here. Notably, those courts to have considered invasion of privacy claims similar to Defendant’s in this same context have dismissed them. *See, e.g., Duty*, 2006 U.S. Dist. LEXIS 20214 at * 11-12 (dismissing defendant’s intrusion upon seclusion counterclaim because defendant could not show that plaintiffs intruded upon her private affairs) (Ex. F); *Tschirhart*, U.S. Dist. LEXIS 70332, at 6 (dismissing invasion of privacy counterclaim because defendant had no reasonable expectation of privacy) (Ex. G).

A. The Conduct of Which Defendant Complains Is Protected Under Both the *Noerr-Pennington Doctrine* and California’s Litigation Privilege.

Defendant’s claim for invasion of privacy fails because the conduct of which Defendant complains is protected under the *Noerr-Pennington* doctrine and California’s litigation privilege. The First Amendment guarantees “the right of the people . . . to petition the Government for redress of grievances.” U.S. CONST. amend. I. The Supreme Court has declared the right to petition to be “among the most precious rights of the liberties safeguarded by the Bill of Rights.” *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967). This right to petition – often referred to as *Noerr-Pennington* immunity – has been construed to afford a party the right to access the courts. *See California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972). Consistent with this right, numerous courts have shielded litigants from claims relating to the filing of litigation. *See, e.g., Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092-1093 (9th Cir. 2000);

1 *Chemicor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-129 (3d. Cir. 1999); *Video Int'l Prod., Inc.*
 2 *v. Warner-Amex Cable Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Havoco Am., Ltd. v.*
 3 *Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983); *Duty*, 2006 U.S. Dist. LEXIS 20214, * 12 (Ex. A).

4 The filing of a lawsuit is not the only conduct protected by the *Noerr-Pennington* doctrine.
 5 Settlement discussions, including offers of settlement, constitute "conduct incidental to the
 6 prosecution of the suit" that is protected under *Noerr-Pennington*. *Columbia Pictures Indus., Inc.*,
 7 944 F.2d at 1528; *see also Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (holding that
 8 settlement communications prior to litigation are protected activity, and that such protection extends
 9 to legal representations made during the course of such settlement communications). Even the mere
 10 threat of a lawsuit is protected by the *Noerr-Pennington* doctrine. *Coastal States Marketing, Inc. v.*
 11 *Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983).

12 Likewise, California has its own litigation privilege, as codified in *Civil Code* section 47(b).
 13 This statute provides:

14 A privileged publication or broadcast is one made:

15 (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other
 16 official proceeding authorized by law, or (4) in the initiation or course of any other
 proceeding authorized by law

17 Cal. Civ. Code §47(b).

18 The principal purpose of the privilege for communications made in judicial proceedings is to
 19 afford litigants and witnesses the utmost freedom of access to the courts without fear of being
 20 harassed subsequently by derivative tort actions. *California Physicians' Service*, 9 Cal. App. 4th at
 21 1325-1326. California's litigation privilege immunizes defendants from tort liability based on
 22 theories of invasion of privacy and intentional infliction of emotional distress ("IIED"), amongst
 23 others. *Id.* The only exception to application of *Civil Code* section 47(b) to tort suits is for
 24 malicious prosecution. *Id.*

25 Here, as demonstrated on the face of Defendant's Counterclaim, the alleged actions and
 26 communications on which Defendant relies to support his invasion of privacy claim were all incident
 27 to the litigation undertaken by Plaintiffs. All rhetoric aside, the alleged conduct that Defendant
 28 complains of in his counterclaim is conduct that has allegedly occurred either during the course of

1 judicial proceedings or as a necessary precursor to Plaintiffs' efforts to legitimately enforce their
2 copyrights in the underlying action. *See Heslep*, slip op. at 11-12 (Exhibit ____).

3 Specifically, Defendant alleges that Plaintiffs "obtained Defendant's private information
4 relating to Defendant's account with his internet service provide through the use of unlawful and
5 improper *ex parte* communications with this Court and by misleading this Court." (Counterclaim, ¶
6 57). As previously discussed, Plaintiffs obtained Defendant's IP address just as any member of the
7 public using the LimeWire P2P file sharing service could. *See, e.g., Columbia Pictures*, 2007 U.S.
8 Dist. LEXIS 63620, *7 (users of P2P file sharing systems openly disclose their IP addresses as part
9 of the file transfer process). Plaintiffs subsequently filed a "Doe" lawsuit, naming the user of this
10 particular IP address as Doe #9. *See, Complaint, Sony BMG Music Ent.*, Case No. 07-CV-00581
11 BJM (S.D. Cal. 2007). Plaintiffs obtained an order to take immediate discovery in this action for the
12 limited purpose of learning the identity of the person to whom this IP address was assigned. In
13 response to a Rule 45 subpoena, SBC identified Defendant as that person, thus resulting in this suit.

14 Defendant attempts to compensate for his inability to state claim by characterizing this
15 conduct as "unlawful" and "improper," and accuses Plaintiffs of "misleading" the Court.
16 (Counterclaim, ¶ 57). These claims are entirely baseless, as evidenced by the pleadings and papers
17 on file with this Court, both in the previously-filed Doe action and this action. This conduct of
18 which Defendant complains in support of his claim falls squarely within the *Noerr-Pennington*
19 doctrine and California's litigation privilege. Indeed, the very purpose of the litigation privilege is to
20 afford litigants the utmost freedom of access to the courts without fear of being harassed
21 subsequently by derivative tort actions. *See California Physicians' Service*, 9 Cal. App. 4th at 1325-
22 1326.

23 As demonstrated by the above, Defendant has not, and cannot, state an actionable claim for
24 invasion of privacy through intrusion into private affairs.

25 **B. Defendant Has Not Stated A Claim For Invasion Of Privacy Through Intrusion**
26 **Into Private Affairs.**

27 To prove an "intrusion into private affairs" invasion of privacy claim, Defendant must show
28 that the Plaintiffs penetrated some zone of physical or sensory privacy surrounding, or obtained
unwanted access to data about, Defendant. *Schulman v. Group W. Productions*, 18 Cal. 4th 200, 232

1 (1998). In order to sustain this cause of action, Defendant must have had an objectively reasonable
2 expectation of seclusion or solitude in the place, conversation or data source. *Id.*

3 Here, Defendant does not even allege with any specificity the supposed "private" information
4 that Plaintiffs obtained, let alone that he had any reasonable expectation of privacy in said
5 information. Nor does Defendant allege when or how Plaintiffs intruded upon his supposedly
6 private affairs.

7 Nonetheless, assuming again that Defendant's allegations relate to Plaintiffs' detection of
8 copyright infringement, even if such allegations were properly pled, they fail as a matter of law
9 because no user of a P2P file-sharing service such as LimeWire can have a reasonable expectation of
10 privacy for computer files distributed over the Internet. *See Columbia Pictures*, 2007 U.S. Dist.
11 LEXIS 63620, *7 (observing that users of P2P file sharing systems have little to no expectation of
12 privacy because they broadcast their identifying information to everyone in the "swarm" as they
13 download the file); *In re Verizon Internet Servs.*, 257 F. Supp. 2d at 267 ("[I]t is hard to understand
14 just what privacy expectation [a peer-to-peer user] has after essentially opening the computer to the
15 world."); *Tschirhart*, 05-CV-372-OLG, slip op. at 6 ("A user of a P2P file-sharing network has little
16 or no expectation of privacy in the files he or she offers to others for downloading.") (Ex. G). Here,
17 Defendant's shared folder was open for the world to see, and Plaintiffs cannot have committed any
18 invasion of privacy in viewing and downloading sound recordings from that folder.

19 Lastly, Defendant admits in his Counterclaim that the computer at issue was his own
20 "personal computer." (Counterclaim, ¶53) However, Defendant denies responsibility for the
21 copyright infringement at issue. (Counterclaim, ¶¶16, 18). To the extent that Defendant is denying
22 responsibility or ownership of the sound recordings or the "shared" folder on his computer, he has
23 no standing to assert an invasion privacy claim, as Defendant has no actionable interest in the
24 privacy of another. *See Tschirhart*, U.S. Dist. LEXIS 70332, at 6 (defendant claiming that audio
25 files being shared in computer's shared folder did not belong to her lacked standing to assert
26 invasion of privacy claim) (Ex. G).

27
28

C. Defendant Has Not Adequately Pled A False Light Claim.

In California, a “false light” cause of action is in substance equivalent to a libel claim, and should meet the same requirements of a libel claim. *Aisenon v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 160 (1990). In order to establish this claim, Defendant must establish: 1) that Plaintiffs publicized information or material that showed Defendant in a false light; 2) that the false light created by the publication would be highly offensive to a reasonable person; and, 3) that Plaintiffs knew the publication would create a false impression about Defendant, or acted with reckless disregard for the truth, or were negligent in determining the truth of the information or whether a false impression would be created by its publication. *Cal. Civ. Jury Inst. (“CACI”), No. 1802.* In determining the “offensiveness” of an invasion of a privacy interest, courts consider, among other things, the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded. *Hill v. Nat’l Collegiate Ath. Ass’n*, 7 Cal. 4th 1, 26 (1994).

Here, Defendant’s claim is silent as to the publication allegedly made by Plaintiffs that placed him in a false light. Defendant does not explain the manner by which he claims Plaintiffs made such a publication, nor does he allege to whom or where the publication was made. Indeed, Defendant fails to allege any of the elements necessary to state a false light claim.

To the extent that the purported underpinning for Defendant’s claim is Plaintiffs’ filing of the Complaint, that act – the petitioning of courts for redress of a grievance – is protected by both the First Amendment and California’s litigation privilege and cannot form the basis for a claim of false light invasion of privacy. *See* Section VI. A. 1., *supra*; *Columbia Pictures Indus.*, 944 F.2d at 1529; *California Physicians’ Service*, 9 Cal. App. 4th at 1325-1326; *Smith v. Maldonado*, 72 Cal. App. 4th 631, 645 (1999) (cause of action for defamation required publication that is *unprivileged*).

D. Defendant Has Not Stated A Claim For Invasion Of Privacy Through Public Disclosure Of Private Facts.

The elements of a cause of action for invasion of privacy through public disclosure of private facts are: 1) public disclosure; 2) of a private fact; 3) which would be offensive and objectionable to

1 the reasonable person; 4) which is not of legitimate public concern. *M.G. v. Time Warner*, 89 Cal.
2 App. 4th 623, 631 (2001).

3 Here, Defendant's claim fails because he has not, and indeed cannot, show that Plaintiffs had
4 any private information or made any private information known to the public. Additionally, as noted
5 above, Defendant cannot, as a matter of law, have any reasonable expectation of privacy in the files
6 that he distributed over the Internet through the LimeWire file-sharing service. See *Tschirhart*, 05-
7 CV-372-OLG, slip op. at 6 (Ex. G); see, e.g., *Columbia Pictures, Inc.*, 2007 U.S. Dist. LEXIS
8 63620, *7 (observing that users of P2P file sharing systems have little to no expectation of privacy
9 because they broadcast their identifying information to everyone in the "swarm" as they download
10 the file, and because they openly disclose their IP addresses as part of the file transfer process); *In re*
11 *Verizon Internet Servs.*, 257 F. Supp. 2d at 267 ("[I]t is hard to understand just what privacy
12 expectation [a peer-to-peer user] has after essentially opening the computer to the world.").

13 The fact is that the only possible "public disclosure" of which Defendant could complain is
14 the Plaintiffs' Complaint either in this case or in the Doe action, which, as demonstrated above, is
15 protected conduct that cannot give rise to any claim for invasion of privacy under the *Noerr-*
16 *Pennington* doctrine and California's litigation privilege. See *Columbia Pictures Indus., Inc.*, 944
17 F.2d at 1528; *California Physicians' Service*, 9 Cal. App. 4th at 1325-1326.

18 In sum, Defendant has failed to state a claim for invasion of privacy under any recognized
19 theory. As a matter of law, Defendant could not have any reasonable expectation of privacy in the
20 contents of his "shared" folder, and the only possible "publications" on which Defendant could base
21 a claim are the documents filed by Plaintiffs with this Court in connection with their copyright
22 infringement claim, which are thus privileged and immune from tort liability. For all of the
23 foregoing reasons, Defendant's invasion of privacy counterclaim should be dismissed.

24 **VII. DEFENDANT'S CLAIM FOR IIED (COUNT 5) SHOULD BE DISMISSED**
25 **BECAUSE (1) DEFENDANT HAS FAILED TO STATE THE NECESSARY**
26 **ELEMENTS OF HIS CLAIM, AND (2) THE CLAIM IS BARRED BY THE NOERR-**
PENNINGTON DOCTRINE AND CALIFORNIA'S LITIGATION PRIVILEGE.

27 To state a claim for IIED, Defendant must allege: 1) extreme and outrageous conduct by
28 Plaintiffs with the intention of causing, or reckless disregard of the probability of causing, emotional
distress; 2) Defendant's suffering severe or extreme emotional distress; and 3) actual and proximate

1 causation of the emotional distress by the defendant's outrageous conduct. *Cervantez v. J. C. Penney*
2 *Co.*, 24 Cal. 3d 579, 593 (1979). For conduct to be outrageous it must be so extreme as to exceed all
3 bounds of that usually tolerated in a civilized community. *Id.*; compare, *Melovich Builders v.*
4 *Superior Court*, 160 Cal. App. 3d 931, 936 (1984) (outrageous conduct is conduct that is "regarded
5 as atrocious and utterly intolerable in a civilized community"); with *Argwal v. Johnson*, 25 Cal. 3d
6 932, 946 (1979) (liability for IIED does not extend to mere insults, indignities, threats, annoyances,
7 petty oppressions, or other trivialities). Further, in order to prevail on his claim, Defendant must also
8 establish that Plaintiffs' conduct was unprivileged. *Id.* Lastly, whether a defendant's conduct can
9 reasonably be found to be outrageous is a question of law that must initially be determined by the
10 court. *Trerice v. Blue Cross of Cal.*, 209 Cal. App. 3d 878, 883 (1989).

11 When determining whether conduct is sufficiently "outrageous" to support a claim for IIED,
12 courts will consider such factors as whether the defendant has a position or a relationship with the
13 plaintiff that would cause his or her conduct to have a particularly severe impact, whether the
14 conduct is aimed at a plaintiff known to be unusually susceptible to emotional distress, and whether
15 the conduct was intended to inflict emotional distress. See *Alcorn v. Ambro Eng'g, Inc.*, 2 Cal. 3d
16 493, 498 n.2 (1970); *Davidson v. City of Westminster*, 32 Cal. 3d 197, 210 (1982); *Bundren v.*
17 *Superior Court* 145 Cal. App. 3d 784, 791 n.8 (1983). Further, a claim for IIED requires intentional,
18 or at least reckless, conduct, and thus a defendant's conduct must be directed primarily at the
19 plaintiff. See *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991).

20 Here, Defendant does not allege any specific facts establishing "extreme and outrageous"
21 conduct that could serve as a basis for an IIED claim, nor are there any additional factors, such as the
22 relationship of the parties, that would tend to support a finding of "outrageous" conduct. Defendant
23 merely incorporates his previous allegations and does not specify what Plaintiffs allegedly did that
24 qualifies as actionable "outrageous" conduct. Once again, the only conceivable conduct upon which
25 Defendant's claims can be based are those actions taken by Plaintiffs to prosecute their copyright
26 infringement claims, including but not limited to the filing of the "doe" suit and the filing of this
27 action. This conduct cannot serve as a basis for an IIED claim because it is not "outrageous"
28 conduct. See *Heslep*, slip op. at 11-12 (Exhibit A).

1 Plaintiffs' actions in detecting Defendant's copyright infringement were not "outrageous"
 2 because Plaintiffs' investigators merely used the same P2P network used by Defendant in order to
 3 view and obtain that which Defendant was broadcasting to the entire universe of P2P users. *See*
 4 *Columbia Pictures*, 2007 U.S. Dist. LEXIS 63620, *7 (users of P2P file sharing systems broadcast
 5 their identifying information to everyone in the "swarm" as they download the file). Moreover,
 6 Defendant's allegations do not support a finding of any special relationship, or special knowledge
 7 that Defendant was particularly susceptible to emotional distress, that might tend to support a finding
 8 of "outrageous" conduct. Indeed, at the time Plaintiffs obtained the evidence of Defendant's
 9 infringement the only information they had with which to identify him was an IP address, and it was
 10 not until after filing the "Doe" suit that Plaintiffs learned his identity.

11 The only other conduct of which Defendant can complain is Plaintiffs' subsequent action of
 12 filing the Doe suit and/or the Complaint in this Action. Plaintiffs submit that such conduct is not
 13 "outrageous" as a matter of law. However, this Court need not even entertain that issue, as
 14 Plaintiffs' initiation of judicial proceedings to enforce their copyrights is protected and immune from
 15 suit under the *Noerr-Pennington* doctrine and the California litigation privilege. *See Columbia*
 16 *Pictures Indus., Inc.*, 944 F.2d at 1528; *California Physicians' Service*, 9 Cal. App. 4th at 1325-
 17 1326.

18 Accordingly, Defendant's IIED claim should be dismissed.

19 **VIII. CONCLUSION**

20 For the above reasons, Plaintiffs ask the Court to grant their Motion to Dismiss Defendant's
 21 Counterclaims in their entirety.

23 Dated: November 8, 2007

JONATHAN G. FETTERLY
 HOLME ROBERTS & OWEN LLP

25 By s/Jonathan G. Fetterly
 Jonathan G. Fetterly
 Attorney for Plaintiffs
 E-mail: jon.fetterly@hro.com

PROOF OF SERVICE
1013 A(3) CCP REVISED 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, Suite 2800, Los Angeles, CA 90017-5826.

On November 8, 2007, I served the foregoing document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** on the interested party in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☐ BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ BY PERSONAL SERVICE: I caused the above-mentioned document to be personally served to the offices of the addressee.

☐ BY FACSIMILE: I communicated such document via facsimile to the addressee as indicated on the attached service list.

☐ BY FEDERAL EXPRESS: I caused said document to be sent via Federal Express to the addressee as indicated on the attached service list.

☒ BY ELECTRONIC MAIL: I communicated such document via CM / ECF electronic mail to the addressee on the attached service list.

Executed on November 8, 2007, at Los Angeles, California.

X (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


BARBARA E. PETERS

SERVICE LIST

VIA CM / ECF

Attorney for Defendant CHARLES SERRANO

Michael B. Stone, Esq.
4401 North Atlantic Avenue
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Long Beach, CA 90807

PROOF OF SERVICE